No. 87-333

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Port Authority of New York and New Jersey operates the three major airports in the New York City area, LaGuardia Airport, Kennedy International Airport and Newark International Airport. In order to reduce ground congestion at LaGuardia, by far the smallest of these airports, the Port Authority enacted a "perimeter rule" prohibiting non-stop flights to or from LaGuardia in excess of 1500 miles.

Section 105(a)(1) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, prohibits any state or interstate agency from enacting rules "relating to rates, routes, or services of any air carrier . . . ." but Section 105(b)(1) of the Act specifically provides that "[n]othing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport . . . to exercise its proprietary powers and rights." Pub. L. No. 95-504, §4(a), 92 Stat. 1705, 1708 (1978), codified at 49 U.S.C. app. 1305(a)(1), 1305 (b)(1).

The question presented is whether the court of appeals correctly determined that the LaGuardia perimeter rule falls within the "proprietary powers and rights" of the Port Authority specifically reserved by Section 105(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-27a) is reported at 817 F.2d 222. The opinion of the district court (Pet. App. 1a-18a) is reported at 658 F.Supp. 952.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987 (Pet. App. 19a). The court of appeals denied the appellant's petition for rehearing on May 28, 1987 (Pet. App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the petition at 2-3.

STATEMENT

Pursuant to a Congressionally-consented-to Compact between the states of New York and New Jersey and bi-State legislation amendatory and supplemental thereto, including bi-State Air Terminal legislation, N.Y. Unconsol. Laws § 6631 *et seq.* (McKinney 1979 and Supp. 1986); N.J.S.A. 32:1-35.1 *et seq.* (West 1963 and Supp. 1986), The Port Authority of New York and New Jersey (hereinafter "Port Authority") operates the three major airports in the New York City area: Kennedy International Airport, LaGuardia Airport and Newark International Airport. The Port Authority also owns Teterboro Airport which is operated on its behalf by Pan American Airways. Of the three major airports operated by the Port Authority, LaGuardia is the smallest with 662 acres. By comparison, Newark is nearly four times larger with 2300 acres and Kennedy is more than seven times larger with 4930 acres (Pet. App. 2a).

In enacting the Port Authority's air terminal legislation, both States specifically noted that air service is a "regional and interstate problem" and encouraged the "integration of such air terminals as far as practicable in a unified system." (N.Y. Unconsol. Law §6631 (McKinney 1979); N.J.S.A. 32:1-35.1 (West 1963). In order to control airport congestion at LaGuardia, and pursuant to its statutory mandate to operate its airports as a unified system, the Port Authority since the 1950's had an informal perimeter policy at LaGuardia. That policy, which

essentially restricted non-stop operations to domestic airports within 2,000 miles of LaGuardia (Pet. App. 2a), was adhered to by all of the carriers operating at LaGuardia for nearly thirty years. In 1984, after Air Canada threatened to violate the perimeter policy, the Port Authority conducted a comprehensive study of the present day need for a perimeter rule. In the course of its study, the Port Authority solicited the views of the airlines, as well as the Federal Aviation Administration, the Department of Transportation, the State Department and other interested parties (Pet. App. 15a). Significantly, most of the airlines which responded were in favor of the rule and none of the federal agencies took issue with the Port Authority's power to implement such a rule (*Id.*).

On September 13, 1984, based on the study, the Port Authority Commissioners adopted a formal Perimeter Rule for LaGuardia Airport, effective November 1, 1984. The Rule limits airline operations, except operations on Saturday when congestion is not a problem, to non-stop flights to and from points that are located within 1,500 miles of the airport (Pet. App. 15a, 20a).[1] The purpose of the rule is to reduce congestion at the airport by catering to business customers and maintaining the airport for short and medium haul flights which place a lesser burden than long distance flights on LaGuardia's restricted physical facilities, such as parking lots, baggage handling, and terminals. (Pet. App 14a).

The Federal Aviation Administration ("FAA") limits the number of flights during peak hours in and out of LaGuardia, a "high density traffic airport", through the granting of "slots". 14 C.F.R. 93.123 (1987). Each slot authorizes one landing or takeoff by the holder at the airport during a thirty minute period (Pet. App. 20a). The FAA does not require that an airline use

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[1] The only exception to the 1,500 mile rule is for operations to and from Denver which is approximately 1,638 miles from LaGuardia. Service to Denver was "grandfathered" because of the existence of continuous non-stop service between LaGuardia and Denver (Stapleton Airport) since October 1981 and because the service constituted a significant portion of LaGuardia operations (Pet. App. 2a).

the slots for any particular service to any particular destination. As a result of a lottery conducted by the FAA, Western obtained various slots at LaGuardia in March of 1986 (Pet. App. 20a). In May of 1985 and again in early 1986, Western Air Lines, Inc. ("Western")[2] sought permission from the Port Authority to conduct operations between LaGuardia and Salt Lake City which is almost 2000 miles from New York (Pet. App.3a). In both instances, the Port Authority denied permission based on its perimeter rule (Pet. App. 3a). At the time of the district court's decision, Western served Salt Lake City with two daily round-trip flights at Kennedy (Pet. App. 3a).

In August of 1986, Western commenced this suit in district court alleging, *inter alia*, that the perimeter rule violates various federal aviation statutes and the Civil Rights Act of 1871. It also alleged that the rule was invalid under the Supremacy, Due Process, Equal Protection and Commerce Clauses of the United States Constitution (Pet. App. 3a). After denying Western's request for a temporary restraining order, the court held a full hearing on the merits, consolidating, with the consent of all parties, Western's claims for preliminary and permanent injunctive relief (*Id.*).

On September 3, 1986, in a comprehensive opinion, the district court denied Western's application for preliminary and permanent relief and ordered that the complaint be dismissed.[3] After reviewing the applicable legislative history and

[2] The petition in this Court was filed by Delta Air Lines, Inc. as the surviving corporation of a merger between Western Air Lines, Inc. and Delta Air Lines Inc. (Pet. ii).

[3] Initially the district court rejected Western's argument that Congress intended that private rights of action would lie to enforce the Deregulation Act, 49 U.S.C. app. 1305(a)(1), the Federal Aviation Act of 1958, 49 U.S.C. app. 1349(a), as well as the Airport and Airway Improvement Act, 49 U.S.C. app. 2210(a). However, the court did find that the Supremacy Clause gave Western the power to sue in order to enforce the preemptive effect of 49 U.S.C. app. 1305(a)(1) (Pet. App. 3a-7a).

case law, the court held that the perimeter rule was not preempted by Section 1305(a)(1) reasoning that:

> "A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest."(Pet. App. 10a).

In rejecting the preemption challenge, the court also relied on the Fifth Circuit's decision upholding the perimeter restrictions implemented by the FAA at National Airport. *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). While recognizing that the court in *City of Houston* held that the preemption provision of 49 U.S.C. app. 1305(a)(1) would not restrict the FAA as an arm of the federal government, and that the FAA had the power to impose a perimeter rule based on its authority under the Federal Aviation Act alone, the district court noted that, as an independent ground, the Fifth Circuit also relied on the FAA's power, as proprietor of the airport, to enact perimeter restrictions (Pet. App. 10a-11a).

Finally, in upholding the validity of the perimeter rule,[4] the district court found reasonable the Port Authority's conclusions, supported by the evidence adduced at trial, that:

> "opening LaGuardia to long range aircraft, and with it the leisure traveler, would reduce runway capacity,

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[4] The court first dispensed with Western's claim that by permitting flights to Denver – a city used as a hub by competing airlines – the perimeter rule discriminated against carriers like Western with hubs further from LaGuardia than the 1,500 mile limit. The court found that, as was the case with the FAA's perimeter rule, " '[t]he accident of geography, not any deliberate discrimination against the western states, underlies the . . . rule.' " (Pet. App. 13a quoting, *City of Houston v. FAA*, 679 F.2d at 1198).

> increase delays, result in increasing congestion at the gates, place a heavier demand on ticketing, baggage claim facilities and public areas, increase use of parking lot facilities and cause roadway and terminal frontage access to become more congested. In the Port's view, the short haul or business traveler moves more quickly through the airport with less luggage and fewer 'meters and greeters'. It is for similar reasons that the FAA imposed a perimeter at National Airport. *See City of Houston*, 679 F.2d 1184." (Pet. App. 14a).

The court also rejected Western's argument that reducing the perimeter from 2,000 miles to 1,500 miles was arbitrary action on the part of the Port Authority. The court reasoned:

> "[T]he Port Authority conducted a careful study and review of its policy and concluded that a 1,500-mile rule was necessary to meet increasing congestion problems. It is important to keep in mind that at the time of the study, which reflected increasing airport use, there was already in place an informal 2000-mile perimeter. Survey results indicated that the majority of those responding favored some form of perimeter policy and 20 percent favored a 1500-mile rule. *In setting in place a formal rule, therefore, and in light of the prospect of ever burgeoning traffic at LaGuardia, it was not unreasonable to impose a 1,500-mile limit. This is especially true when access to the New York area remains unimpeded at the other area airports.*" (Pet. App. 16a-17a) (emphasis supplied).

In a unanimous opinion, the Second Circuit (Feinberg, C.J.) affirmed the district court's opinion in all respects. On the merits, the court affirmed on the basis of the district court's "well-reasoned opinion" (Pet. App. 27a). The court noted that while "the perimeter rule may be a regulation 'relating to . . . routes' within the meaning of section 1305(a)(1), we agree with [the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls

within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1)" (Pet. App. 27a, citation omitted). The court also rejected Western's claim raised "apparently for the first time" on appeal, "that the FAA, by granting slots, has preempted any regulation of those slots by the Authority" (Pet. App. 27a). The court noted that Section 1305(b)(1) "authorizes the Authority to regulate those slots in accordance with its proprietary powers" and the perimeter rule is an appropriate exercise of those powers (Pet. App. 27a).

The panel denied Western's petition for rehearing and no judge requested a vote on the suggestion that rehearing be held *en banc* (Pet. App. 28a).

ARGUMENT

The court of appeals has correctly resolved the narrow issue of statutory interpretation involved in this case, and its decision does not conflict with any decision of this Court or that of any other court of appeals. Therefore, further review by this Court is not warranted.

1. Petitioner argues that the decision below interferes with federal control over aviation matters and expands the scope of the "proprietary powers" exception beyond Congress' original intent (Pet. 10). Petitioner's argument finds no support in the decisions on which it relies. In fact, quite to the contrary, the federal courts have repeatedly recognized that the power of an airport proprietor to regulate access to its airport and to protect the airport environment has not been preempted by federal legislation.[5]

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[5] The Air Transport Association of America (ATA), which has filed an amicus brief in support of the petition, does not attempt to construct a conflict between the decision below and any other decisions rendered by this Court or by the courts of appeals. Indeed, it mentions that the extent of airport operator's proprietary powers has not been precisely defined (Br. at 7). Instead, the ATA argues that "this Court should grant the petition herein and abort an *emerging, judicially created* conflict between [Section 1305's] two subsections" (Br at 8, emphasis supplied in part). This brief will show that (*infra* at 12-15), contrary to ATA's argument, the decision below creates no conflict between subsection (a) and subsection (b) of Section 1305.

a. In support of its argument, petitioner first attempts to construct a conflict, albeit in approach, between the decision below and this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (Pet. 10-11). *City of Burbank*, however, did not involve a rule adopted by an airport proprietor as landlord, but rather involved an ordinance enacting a curfew on jet takeoffs adopted by the City, which did not own or operate the airport, pursuant to its police power. Although this Court found that the rule was preempted by the pervasive nature of federal control over "air traffic flow" (411 U.S. at 639), this Court explicitly refrained from considering "what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 635 n.14.

The legislative history of the Deregulation Act demonstrates in unequivocal terms that the preemptive effect of Section 105(a)(1) was not intended to limit the "long recognized powers of airport operators to deal with noise *and other environmental problems at the local level.*" 124 Cong. Rec. 37419 (1978) (remarks of Sen. Kennedy) (emphasis supplied). As the district court below stated, "*[a] proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager* (Pet. App. 10a)(emphasis supplied).[6] Contrary to petitioner's contention, this

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[6] In fact, in considering the Airport and Airway Improvement Act of 1980, Congress acknowledged that reducing airport congestion was a valid airport proprietor's right. In its report on the legislation (H.R. 6721), the House Committee on Public Works and Transportation stated on the issue of whether local authorities had the power to impose access restrictions for airports:

> "*In the Committee's opinion it would not be unjust, discriminatory, unfair or unreasonable, or violate any other law or regulation or Federal grant agreement for an airport proprietor to deny access* to a new carrier or additional operations by an existing carrier in a primary hub area *where access to the area is provided for by another air carrier airport in that hub* which holds itself out to accept the new carrier or the additional operations of the existing carrier on substantially the same terms as it applies to other air carriers." H.R. Rep. No. 96-887, Part 2, 96th Cong.2d Sess. 15-16 (1980) (emphasis supplied).

holding is consistent with decisions rendered both before and after this Court's decision in *City of Burbank* which have held that airport proprietors have the authority, as local managers of the airport, to control airport access and to protect the "human environment" surrounding the airport (*Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981)).

For example, courts have acknowledged that airport proprietors have an important role to play in controlling noise levels of planes in and around the airport and, therefore, may enact reasonable noise control regulations. *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *Global International Airways Corp. v. Port Authority of New York and New Jersey*, 727 F.2d 246 (2d Cir. 1984); *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977), *on remand*, 437 F. Supp. 804 (S.D.N.Y. 1977), *aff'd*, 564 F.2d 1002 (2d Cir. 1977); *National Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D. Cal. 1976). Other cases have recognized the power of airport proprietors to regulate airport capacity as a means of controlling airport congestion. *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984) (upholding airport operator's authority to deny access to airline in an airport already filled to capacity in order to allow operator time to develop reasonable rules to allocate airport space and landing and takeoff sl[illegible]); *Aircraft Owners & Pilots Association v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969) (upholding the Port Authority's imposition of a minimum flight fee on general aviation during peak hours as a means of reducing airport congestion). [7]

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[7] The ATA, citing a letter written in 1979 by the General Counsel of the CAB to the Director of the San Francisco Airports Commission, appears to argue that airport proprietors have no role to play in regulating airline access to overly crowded airports. In that letter, the CAB General Counsel expressed reservations about the method chosen by the Commission to restrict the use of San Francisco International Airport by new airlines not currently serving the airport. However, in that letter, the CAB General Counsel did not state that local authorities had no power to enact measures restricting access to the airport and, in fact, invited the Commission to reconsider the resolution

(Footnote continued)

b. Equally unconvincing is petitioner's contention that the decision below conflicts with the Ninth Circuit's decision in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (Pet. 11-12). In that case, the Ninth Circuit determined that the State of California under its police power had no authority, in the face of federal laws which preempted the field of airspace management and aircraft noise control, from requiring an unwilling airport proprietor to impose a curfew on aircraft flights. Since the noise regulations in that case were not implemented by an airport proprietor, but, in fact, were challenged by an airport proprietor, the Court did "not address the scope of the [proprietor] exception . . . ." 651 F.2d at 1316. Petitioner focuses on *dicta* in that decision which it argues indicates that the "proprietary powers and rights" exception applies only to regulations designed to limit an airport proprietor's liability for activities arising from its airport operations (Pet. 11-12). 651 F.2d at 1316. Significantly, however, petitioner completely overlooks the fact that, in the same year, in a decision which directly addressed the scope of an airport proprietor's rights, the Ninth Circuit ruled that the City of Santa Monica, as proprietor of an airport, "should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability *or enhance the quality of the city's human environment*". *Santa Monica Airport Association v. City of Santa*

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and replace it with a "nondiscriminatory policy restricting use of the airport . . . (Br. App. A at 3a).

Also inapposite is ATA's reliance on the Civil Aeronautics Board (CAB) decision in *Austin/San Antonio-Atlanta Service Investigation*, 80 C.A.B. 242(1979). In that case, the CAB refused the suggestion of local authorities, including the City of Austin, that it take into account airport congestion and limit entry into a single market to two competing airlines. The CAB's decision that it was "not now inclined to deny entry to any qualified applicant simply in order to avoid airport congestion" (80 C.A.B. at 250) must be read in light of Congress' statement one year later that airport proprietors may "deny access to a new carrier or additional operations by an existing carrier in a primary hub area . . . ." H.R. Rep. No. 96-887, *supra*, note 6.

Monica, 659 F.2d at 104 n.5 (emphasis supplied). To the same effect, the Second Circuit, in tracing the authority of an airport proprietor to enact noise ordinances, noted that "perhaps more important" than the the right of an airport proprietor to limit liability is "that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access". *British Airways Bd. v. Port Authority of New York*, 558 F.2d at 83.

c. Finally, the decision below is consistent with the only court of appeals decision to have ruled on the issue of whether a perimeter rule is a valid exercise of an airport proprietor's rights. In *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), the Court rejected a preemption challenge to the perimeter rule promulgated by the FAA at National Airport. In enacting the rule, the FAA relied not on safety concerns, but rather, on its power as proprietor of the airport. 679 F.2d at 1193-94. "Analogizing to the right of a store owner to run his business, FAA acted to manage, as best it could, the great and increasing volume of air traffic in the Washington area" (679 F.2d at 1194). Petitioner (Pet. 14-15 n. 20) notes that the preemption challenge in that case was rejected because "section 105 by its terms did not apply to federal agencies. [679 F.2d] at 1194." However, as the district court below noted, the *City of Houston* court "also held, as an independent ground, that the FAA's proprietary interest was sufficient to justify the rule". (Pet. App. 11a). *City of Houston*, 679 F.2d at 1193 ("The Federal Aviation Act and the FAA's status as proprietor of National and Dulles provide independent support for its decision"). As the district court below observed, there is "no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same" (Pet. App. 11a).[5]

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[5] Petitioner also contends (Pet. 15) that the decision below conflicts with the decision rendered by the CAB in *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979). In that case a majority of the CAB held that the local authorities had no veto authority over a CAB decision to certify operations

(Footnote continued)

2. Petitioner next contends that the perimeter rule is preempted because it constitutes a direct rather than incidental regulation of "rates, routes, or services", which is prohibited by Section 105(a)(1) of the Deregulation Act. 49 U.S.C. app. 1305(a)(1). Petitioner argues that "[b]y permitting direct local regulation of the length of non-stop flights and thus of rates, routes, and services, the decision below undercuts the federal plan of deregulation" – "to provide abundant, affordable, and convenient air service" (Pet. 12). The amicus, the ATA, similarly argues that the decision below allows "airport owners to adopt rules relating to routes and services in the name of proprietary rights and powers", thereby rendering "subsection 105(a)(1), and thus all of Section 105, meaningless" (Br. at 9). Petitioner and the amicus misread the statute and misunderstand the effect of the perimeter rule on air travel.

Even if the perimeter rule does have some effect on "rates, routes, and services"[9], this does not mean that the rule is preempted. Section 105(a)(1) was enacted not to limit airport proprietor rights, but rather, to prevent states and other local governmental

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of Southwest Airlines between Dallas/Fort Worth (Love Field) and New Orleans because the local authorities wanted to bar interstate flights from Love Field. One Board member dissented, finding no reason to question the local authorities' determination that interstate flights should be limited to the Dallas/Fort Worth Regional Airport. However, of most importance, although a majority of the CAB rejected what it found to be an attempt to veto its certification, it explicitly recognized that its decision granting the application did not prevent the local authorities from exercising whatever legitimate proprietary rights they might have. In this situation, the Port Authority is not discriminating against interstate operations at LaGuardia Airport. The Port Authority is simply exercising a legitimate proprietary right it exercised, albeit informally, prior to deregulation – the power to combat congestion at its smallest major airport by requiring that airlines operating out of that airport observe a reasonable perimeter rule.

[9] The court of appeals below agreed with the district court that "the perimeter rule may be a regulation 'relating to . . . routes' " but nevertheless, falls within the proprietary powers exception (Pet. App. 27a). We argued below, and we still believe, that the perimeter rule as enacted does not affect Western's "routes" since it remains free to operate its nonstop Salt Lake City-New York Service at either Kennedy or Newark airports. The perimeter rule merely diverts long-haul traffic from LaGuardia to the other major airports operated

(Footnote continued)

entities from promulgating *economic regulations* for air carriers, a regulatory function which was previously exercised by the CAB.[10] See H.R. Conf. Rep. No. 95-1779, 95th Cong. 2d Sess. 94-95 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-3805; 123 Cong. Rec. 30595-30596 (1977). Section 105(b)(1) makes clear that airport proprietor's powers remain intact by providing, in no uncertain terms, that "*[n]othing in subsection (a)* of this section shall be construed to limit" an airport operator's proprietary powers (emphasis supplied). This necessarily means that even though a regulation may be found to affect "rates, routes, or services", an airport proprietor retains the authority under subsection (b) to promulgate rules and regulations in the exercise of its proprietary powers. While petitioner apparently admits that the statute contemplates that certain rules enacted by an airport proprietor may "*incidentally*" affect "rates, routes, or services" without being preempted (Pet. 12, emphasis in original), its concession misses the point. As the court of appeals below recognized (Pet. App. 27a), the inquiry is not whether the regulation in some degree, incapable of precise measurement, impinges on "rates, routes, or services", but rather, whether it "falls within the powers reserved to the airport proprietors by Congress". *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 96-97 (2d Cir. 1986), *cert denied*,

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by the Port Authority which are larger and therefore better able to accommodate the increased congestion which such traffic causes. Further, petitioner is free to operate from LaGuardia to points outside the perimeter as long as it makes one stop inside the perimeter. (Pet. App. 11a).

[10] The ATA agrees with this basic proposition stating in its amicus brief that the goal of deregulation was "to assure that state and local authorities would not move to fill the vacuum left by the cessation of *federal economic regulation* of the national air transportation system" (Br. at 6, footnote omitted, emphasis supplied; see also ATA Br. at 3,4,5,6,8 and 9). Further, as ATA notes (*Id.* at 5-6), Congress was also concerned about dual (Federal/State) regulation of interstate/intrastate service. Nonetheless, at the same time, Congress made clear that deregulation was "not intended to preempt the exercise of normal proprietary functions by airport operators . . . ." 123 Cong. Rec. 30595-30596 (1977). As this brief will demonstrate, the ATA is wrong when it assumes that the LaGuardia perimeter rule constitutes "economic regulation" of the airlines rather than a valid exercise of proprietary rights.

___ U.S. ___, 107 S.Ct. 248 (1986) ("The relevant inquiry therefore is whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport . . .").

Moreover, the petitioner mischaracterizes the effect of the perimeter rule when it states that the rule works against the goals of airline deregulation which are to increase the abundance, affordability and convenience of air service. The amicus, the ATA, makes a similar mistake when it argues, without ever proving its point, that the decision below conflicts with Congressional intent underlying deregulation. As the Fifth Circuit commented, in addressing a constitutional challenge to the perimeter rule issued by the FAA for National Airport:

> No one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim. *Rather, the perimeter rule gives travelers a choice. Those who prefer nonstop service may use Dulles; those who do not mind a stopover in Chicago, Atlanta, St. Louis, Memphis, Pittsburgh, New Orleans, or Charlotte, may take a slightly lengthier trip and arrive at or depart from National. . . ." (City of Houston v. FAA*, 679 F.2d at 1192)(emphasis supplied).

Similarly, the perimeter rule for LaGuardia, which was enacted by the proprietor of a multi-airport system in a single metropolitan area, merely "gives travelers a choice" of which airport they may wish to travel through. As the District Court below observed, "[the] effect of the perimeter rule . . . is *to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter*" (Pet. App. 11a, emphasis supplied).[11] The LaGuardia perimeter rule does

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[11] The amicus, the ATA, argues that this Court should grant certiorari because, in its view, if the decision below is allowed to stand, other major airport proprietors will enact perimeter rules and eliminate flights between

(Footnote continued)

not regulate the economics of air service between New York and other points beyond the perimeter because "*access to the New York area remains unimpeded at the other area airports*" (Pet. App. 17a, emphasis supplied). Indeed, in view of the fact that a formal perimeter rule was adopted by the Port Authority in order to alleviate the critical problems of airport congestion during peak periods of travel at LaGuardia — the major airport in the area with by far the smallest land area (Pet App. 14a-15a) — the rule operates in furtherance of, not against, the goal of improving the convenience of air service (Pet. App. 11a).[12]

3. Petitioner also asserts that by sustaining the Port Authority's adoption of a perimeter policy at LaGuardia, the court has hampered "the FAA's ability to carry out its duty to promote

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certain cities thereby affecting a substantial number of airline passengers (Br. at 13-14). As does the petitioner, the ATA misunderstands the effect of the LaGuardia perimeter rule and the limited holding of the decision below sustaining the rule. As the courts below recognized, in this case access to the New York area by air carriers desiring to provide non-stop service outside the perimeter remains unimpeded. The decision below merely sanctions reasonable, nondiscriminatory perimeter rules which are enacted by a multi-airport proprietor such as the Port Authority.

[12] Petitioner grossly overstates the effect of the decision below when it argues that its rationale would sanction other far-reaching measures designed to reduce ground congestion such as an airport proprietor's elimination of discount fares, regulation of airline schedules and restrictions on the amount of baggage (Pet. 13). As we have noted, by the enactment of Section 105(a)(1) and 105(b)(1), Congress sought to prevent states and other local governmental entities from assuming *economic regulatory* functions over airline service and fares previously exercised by the CAB, while preserving an airport proprietor's authority to exercise its proprietary rights (*supra* at 12-14). In light of this clear legislative purpose, a court could easily find that the control of airline fares, a matter which prior to deregulation was pervasively controlled by the CAB, would not constitute a legitimate exercise of an airport proprietor's rights. Similarly, depending on how such measures were drawn, the same might be said for attempts to control airline schedules or passenger baggage allowances. In any event, consistent with the decision below, a court would have to scrutinize such rules to determine whether they " 'unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.' " (Pet. App. 12a, citation omitted).

(Footnote continued)

efficient use of the nation's airspace", citing 49 U.S.C. 1348 (Pet. 16). Aside from the fact that petitioner's allegation is best addressed, at least in the first instance, to the FAA (Pet. App. 6a-7a, 16a), petitioner once more misconstrues the effect of the perimeter policy. The perimeter policy is a permissible exercise of the Port Authority's power, as proprietor of a multi-airport system, to control ground congestion and airport access at LaGuardia Airport. While the FAA undoubtedly has "exclusive control of airspace management" (*British Airways Bd v. Port Authority of New York*, 558 F.2d at 83), the airlines are not immunized from regulations by airport proprietors "as the unitary local authority who controls airport access" (*Id.*). By specifically reserving the airport proprietor's powers, Congress recognized that the FAA's control of the national airspace and the proprietor's control of local airport access and environment were not incompatible[13].

4. Finally, although the petitioner does not now question the reasonableness of the perimeter rule, it is important to note that the court below was plainly correct when it determined that the rule constitutes a reasonable means to accomplish the goal of controlling congestion at LaGuardia Airport. After reviewing the Port Authority's comprehensive study of the issue and

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Petitioner also misstates the rationale of the perimeter rule when it argues that the rule is inconsistent with testimony before Congress "that a local airport authority cannot decide that service to Denver or Salt Lake City is more important than service to San Francisco" (Pet. 14, citation and emphasis omitted). In adopting a formal perimeter rule for LaGuardia Airport, the Port Authority did not decide that service to any one destination was more important than service to another, but rather, that long haul service should be handled at its larger airports which are better equipped to deal with the congestion problems created by such flights.

[13] Petitioner argues now, as it did on appeal that the perimeter rule is preempted by the FAA's issuance of slots for takeoff and landing at LaGuardia, an airport designated as a high density airport by the FAA. 14 C.F.R. 93.123. (Pet. 16-17). Such argument is totally lacking in merit. First, petitioner fails to show any conflict between the perimeter rule and the issuance of slots by the FAA (Pet. App. 12a n.12). This is not surprising since the FAA does

(Footnote continued)

after a full hearing on the merits, the district court below, in an opinion which was affirmed as "well-reasoned" by the court of appeals, found that opening LaGuardia to long haul traffic would only worsen the ever increasing congestion problems at the airport. Significantly, although a perimeter policy has applied to LaGuardia Airport since the late 1950's, aside from this litigation, no airline or other party has challenged the policy in court. Moreover, while the petitioner and the ATA attempt to magnify the significance of the holding by the court below, the actual issue decided was merely that a proprietor that operates more than one airport in a single metropolitan area has the authority to enact a reasonable, nondiscriminatory perimeter rule for its smallest major airport in order to control congestion at that airport. Further review of this decision is plainly unwarranted.

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not require that the slots be used for any particular service. Moreover, as the court of appeals held, the perimeter rule is a proper exercise of the Port Authority's proprietary powers and "[t]he statute . . . authorizes the Authority to regulate those slots in accordance with its proprietary powers" (Pet. App. 27a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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